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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ESTATE OF DAN B. CULL, Deceased,
WILLIAM J. CULL, Administrator,
and
CONNIE E. CULL, Surviving Spouse,
Petitioners,

versus

COMMISSIONER of INTERNAL REVENUE,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 17, 1985

Question Presented For Review

Whether a taxpayer must, in all circumstances, always offer "goods or services" in order to be engaged in a "trade or business" within the meaning of 26 U.S.C. Sec. 62(1) for purposes of determining adjusted gross income, or whether the proper test for determining if a taxpayer is engaged in a "trade or business" is a review of all the "facts and circumstances" in each individual case.

List of All Parties

Estate of Dan B. Cull, Deceased
William J. Cull, Administrator
Connie E. Cull, Surviving Spouse

Petitioners

Commissioner of Internal Revenue

Respondent

Alice F. McDonald
Mr. & Mrs. Milton Gorlovsky
Mr. & Mrs. Joseph Visingardi

Amici Curiae in the Sixth
Circuit Court of Appeals
on Appeal from the Decision
of the Tax Court

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Reference to Opinion Below

The opinion of the Court of Appeals appears in the Appendix hereto at page 1. It was reported at 746 F.2d 1148.

Statement of Grounds on Which Jurisdiction is Invoked

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 23, 1984, and this petition for certiorari was filed within ninety (90) days of that date.

Jurisdiction to review the judgment of the Court of Appeals in this case is conferred on this Court pursuant to 28 U.S.C. Sec. 1254(1).

Statutes and Rules

The pertinent portions of the Internal Revenue Code of 1954, 28 U.S.C. Sec. 1254(1), and Rule 13 of the Federal Rules of Appellate Procedure appear at pages 24-32 of the Appendix.

Statement of the Case

The facts of the case below appear in the Findings of Facts of the Tax Court, pages 11, 12, and 13 of the Appendix. In brief summary, the essential facts are as follows.

The Decedent, Dan B. Cull, and Petitioner, Connie E. Cull, jointly filed an original income tax return for the year 1977 and reported gambling winnings of the Decedent in the amount of Forty-Seven Thousand Nine Hundred Eight and 10/100 Dollars ($47,908.10), as a part of wages, salary or other compensation on the original Form 1040.

Later, Petitioner and Decedent filed an amended return on which they reported the $47,908.10 as gross receipts of a sole proprietorship and deducted the same amount

as trade and business losses pursuant to 26 U.S.C. Sec. 62(1) so as not to give rise to items of tax preference which were subject to a minimum tax under Sections 56 and 57 of the Internal Revenue Code.

In a statutory notice issued March 6, 1980, the Commissioner disallowed the use of a Schedule C for the reporting of Decedent's gambling winnings and losses. Petitioners filed a petition with the Tax Court for a redetermination of the deficiency pursuant to 26 U.S.C. Sec. 6213(a).

The Tax Court held that the gambling losses were attributable to a trade or business, and hence not subject to the minimum tax. The Commissioner filed a Notice of Appeal pursuant to 26 U.S.C. Sec. 7483 and Rule 13 of the Federal Rules

of Appellate Procedure.

The Court of Appeals for the Sixth Circuit reversed holding that the "facts and circumstances" approach "establishes factors to be considered before the application of a legal standard and [it] is not an alternative to [the "goods and services"] test." (Appendix at 8.)

Reasons for Granting the Writ

1. THE DECISION RENDERED BY THE COURT BELOW, AND THE DECISION RENDERED BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT, CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON THE SAME MATTER.

In Nipper v. Commissioner, Docket 4970-81, T.C., Memo 1983-644; 11th Circuit, Docket 84-3067, the U.S. Court of Appeals

for the Eleventh Circuit upheld the Tax Court holding that a full-time gambler whose sole means of support was his gambling winnings, "was in the trade or business of gambling within the meaning of Section 62(1)." T.C. Memo 1983-644. In Nipper, as in the instant case, the taxpayer did not hold himself out to others as offering "goods or services". Nevertheless, the Eleventh Circuit held him to be "in the trade or business of gambling". Nipper v. Commissioner, No. 84-3067 (11th Cir. filed Oct. 11, 1984).

As in the instant case, and directly in conflict with the decision of the Eleventh Circuit, the Second Circuit overturned the Tax Court in a case where the taxpayer's only income was from pari-mutuel wagering on jai-alai, and the

taxpayer deducted his entire net losses for each year as itemized deductions in arriving at his adjusted gross income. Gajewski v. Commissioner, No. 83-4121, slip op. (2nd Circuit), cert. denied, 105 S. Ct. 88, reh'g denied, 105 S. Ct. 549 (1984).

There, the Second Circuit held: "[I]n order to be classified as engaging in trade or business for the purposes of 26 U.S.C. Sec. 62(1) a taxpayer must, as a minimum, have held himself out to others as offering goods or services." Id. at 617.

An appeal on a similar matter is presently before the Seventh Circuit, Groetzinger v. Commissioner, 82 T.C. 61, 7th Circuit, Docket 84-2507. In Groetzinger, the Tax Court held, as it consistently has done in following its

decision in Ditunno v. Commissioner, 80 T.C. 362 (1983), that a full-time gambler for his own account, was in the trade or business of gambling. The Court further held that gambling losses, at least to the extent of gambling gains, were not items of tax preference for purposes of computing the minimum tax under Section 56, I.R.C., in effect for 1978.

Groetzinger was fully briefed on December 12, 1984, and will be set for oral argument before the Seventh Circuit some time in March or April of 1985.

Another gambling case raising the same issue recently decided by the Tax Court in favor of the taxpayer-petitioner, Barrish v. Commissioner, CCH Dec. 41, 616 (M), Docket Nos. 11020-81, 8746-82, November 20, 1984, T.C. Memo 1984-602, is appealable by

the Commissioner to the Tenth Circuit.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit which is in conflict with the judgment and opinion of the Eleventh Circuit on this matter.

2. THE DECISION RENDERED BY THE COURT BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS HONORABLE COURT.

"Trade" and "business" have been broadly referred to by this Court as any activity engaged in by a person. Flint v. Stone Tracy Co., 220 U.S. 107, 171 (1911).

More narrowly, ever since Higgins v. Commissioner, 312 U.S. 212 (1941), although for purposes of 26 U.S.C. 162, this

Honorable Court has used the "facts and circumstances" test, rejected by the Court below, to determine whether a taxpayer is engaged in a "trade or business".

The "facts and circumstances" test has been applied by this Honorable Court in other situations where the question of whether or not a taxpayer was "carrying on . . . trade or business" has arisen.

City Bank Farmers Trust Co. v. Helvering, 313 U.S. 121 (1941) involved a trustee of two testamentary trusts who sought to deduct expenses of managing the trusts as business expenses within Section 23(a) of the Revenue Act of 1928. Id., at 123. The issue was whether or not the trustee was "carrying on . . . business" within Section 23(a). This Honorable Court regarded Higgins as controlling and applied

the "facts and circumstances" test. Id., at 126.

Similarly, in U.S. v. Pyne, 313 U.S. 125 (1941), a companion case to City Bank Farmer's Trust, where the issue was whether executors were entitled to deduct expenses properly incurred in the administration of an estate as expenses incurred in "carrying on any trade or business", this Honorable Court specifically adopted the Higgins, test, Id., at 129, and reversed a Circuit Court holding because it had adopted and applied criteria inconsistent with Higgins. Id., at 132.

The "goods or services" test, relied on by the Commissioner and the Court below, derives from a concurring opinion by Justice Frankfurter in Deputy v. DuPont, 308 U.S. 448 (1940). However, in that case

the majority did not consider the meaning of "trade or business". Further, only one year after Deputy v. DuPont the same Court heard Higgins v. Commissioner and did not apply the "goods or services" test but instead adopted the "facts and circumstances" test. Notwithstanding the pronouncement of this Honorable Court, the Sixth Circuit Court of Appeals applied the "goods and services" test, and is thus in conflict with this Honorable Court.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit which is in conflict with applicable decisions of this Honorable Court.

3. EVEN IF THE SECOND, SIXTH AND ELEVENTH CIRCUITS DID NOT DISAGREE ON THIS

MATTER, THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS HONORABLE COURT.

There are approximately sixty (60) references in the Internal Revenue Code to the words "trade or business" and no definition of these words in the Code. Further, in the context of certain sections, particularly 26 U.S.C. 62 (1), there is virtually no case law interpretation of the words "trade or business". Tests used in one section are applied by analogy to others. For example, in Ditunno v. Commissioner, 80 T.C. 362 (1983) the Tax Court specifically allowed for the use of tests in the context of Section 162(a) to be used in the context of

Section 62(1).

However, such a practice is not always helpful or advisable as this Court observed in Snow v. Commissioner, 416 U.S. 500 (1974) while attempting to select a test to apply to "carrying on any trade or business" as used in 26 U.S.C. Sec. 174: "Those other sections are not helpful here because . . . Section 162(1) is more narrowly written than is Section 174". Id., at 503.

Taxpayers who are gamblers are not the only individuals who will be affected by a decision defining "trade or business" for purposes of determining adjusted gross income.

The Tax Court noted in Groetzinger v. Commissioner, 82 T.C. 61, Par. 82.61 P-H TC, 7th Circuit, Docket 84-2507: "[I]t is

now clear that an active [securities] 'trader' who looks to profit from short term swings and does not hold securities for long-term appreciation will be deemed to be engaged in a trade or business providing that his trading is frequent and substantial." Par. 82.61 P-H TC at 82-416.

A decision by this Honorable Court defining "trade or business" for purposes of determining adjusted gross income will also affect securities speculators and could have an effect on many other taxpayers including taxpayers who devote all their free time and financial resources to building and racing cars; fiduciaries of trusts and estates; individuals who devote all their free time and financial resources to research and experimentation; individuals who contract and are paid to render

consulting services but who actually render few, if any, such services.

For this reason also, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals which decision affects an indeterminable number of taxpayers other than strictly gamblers.

4. A RULING IN THIS CASE WILL ADD CONSISTENCY TO THE GENERAL BODY OF TAX LAW.

While the Internal Revenue Service has vigorously opposed the Tax Court decision in Cull, Ditunno, Gajewski, Nipper, and other similar cases, the service itself has relied on Ditunno when convenient. For example, in Hornaday v. Commissioner, 81 T.C. ____, No. 51 (CCH Dec. 40, 584 at 3390), the service relied heavily on

Ditunno in successfully arguing that a consultant with only one client was engaged in a trade or business for purposes of liability under the self-emloyment tax. Similarly, the service argued that the "facts and circumstances" test and not the "holding out" test should be employed in another consulting case, Steffens v. Commissioner, 707 F. 2d 478 (11th Cir., 1983).

The question of what is the proper test is an important federal question. The fair and just application of our tax laws require consistency and uniformity in approach. Consistency and uniformity is not achieved when the Commissioner is allowed to apply one test or the other as he finds nice or convenient.

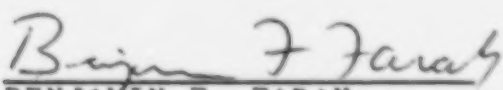
Conclusion

Essentially four (4) reasons exist why a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit: (1) the judgment and opinion of the Sixth Circuit in the instant case conflicts with the judgment and opinion of the Eleventh Circuit in a case in which the facts are nearly identical to the facts of the instant case; (2) the judgment and opinion of the Sixth Circuit in the instant case conflicts with applicable judgments and decisions of this Honorable Court; (3) the question presented is an important question of federal law which has ramifications for an indeterminable number of taxpayers and which has not been, but should be, settled by this Honorable

Court; (4) a ruling by this Honorable Court in this case will add consistency to the general body of tax law and allow for a fair and just application of those laws.

It is therefore requested that this Honorable Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,



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